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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-0234-20

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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CHRISTOPHER MICHAEL RUBIO, APPELLANT

v.

THE STATE OF TEXAS, APPELLEE

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FIFTH COURT OF APPEALS
DALLAS COUNTY

STATE'S BRIEF ON THE MERITS

JOHN CREUZOT
Criminal District Attorney
Dallas County, Texas

JESSIE R. ALLEN
Assistant District Attorney
Lead Counsel
Bar No. 24040412
133 N. Riverfront Blvd., LB-19
Dallas, Texas 75207
jessie.allen@dallascounty.org
(214) 653-3600
(214) 653-3643 fax

The State requests oral argument.

IDENTITY OF PARTIES AND COUNSEL

CHRISTOPHER MICHAEL RUBIO, APPELLANT

LYNN PRIDE RICHARDSON
Dallas County Chief Public Defender

CHRISTI DEAN (Appellate Counsel)
Assistant Public Defender
133 N. Riverfront Blvd., LB-2
Dallas, Texas 75202

PAUL JOHNSON (Trial Counsel)
Attorney at Law
900 Jackson St., Ste. 650
Dallas, Texas 75202

THE STATE OF TEXAS, APPELLEE

JOHN CREUZOT
Dallas County Criminal District Attorney

JESSIE R. ALLEN (Appellate Counsel)
Assistant District Attorney

BRANDI MITCHELL & RYAN SEARCY (Trial Counsel)
Assistant District Attorneys
133 N. Riverfront Blvd., LB-19
Dallas, Texas 75207

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STATEMENT OF THE CASE

A grand jury indicted Appellant for the offense of capital murder (1 C.R. at 9). *See* Tex. Penal Code Ann. § 19.03(a)(7). Appellant pleaded not guilty, and a jury found him guilty of the charged offense (3 R.R. at 17; 4 R.R. at 71). The trial court sentenced appellant to confinement for life (4 R.R. at 71). Appellant timely filed both a motion for new trial and a notice of appeal (1 C.R. at 130–31). The trial court denied the motion for new trial (1 C.R. at 131). Appellant then filed an amended motion for new trial (1 C.R. at 140–226). The State objected to this amendment as untimely, but the trial court conducted a hearing on the motion and then denied relief (1 C.R. at 235–37; 5 R.R. at 6, 84). Appellant appealed, and the court of appeals affirmed the trial court's judgment. *Rubio v. State*, 596 S.W.3d 410 (Tex. App.—Dallas 2020, pet. granted). Appellant then petitioned this Court to review the decision of the court of appeals, and this Court granted that petition. *Rubio v. State*, PD-0234-20 (Tex. Crim. App. July 1, 2020).

ISSUE RESTATED

Rule 21.4(b) permits the State to insist that a trial court rule only on timely filed or timely amended motions for new trial. Here, the State objected to the trial court taking any action on Appellant's amended motion for new trial because it was untimely filed under rule 21.4(b). Given that Appellant's amended motion was untimely, *and the State objected*, did the court of appeals correctly resolve the State's cross-issue in its favor?

STATEMENT OF FACTS

The particulars of the offense and the events during trial are not relevant to the issue before this Court. Accordingly, the State defers to the Dallas Court of Appeals's recitation of those facts in the opinion below. *See Rubio*, 596 S.W.3d 410.

On July 11, 2018, the jury found Appellant guilty of capital murder as charged in the indictment (4 R.R. at 71). The trial court immediately sentenced Appellant to confinement for life (4 R.R. at 71). The same day, Appellant filed a notice of appeal and a motion for new trial (1 C.R. at 130–31). The trial court overruled Appellant's motion for new trial by written order (1 C.R. at 131).

On August 10, thirty days after the trial court imposed sentence, Appellant filed a document entitled "Motion for Leave to File Amended Motion for New Trial and Amended Motion for New Trial" (1 C.R. at 140–225).

On September 14, the State filed a written objection to Appellant's amended motion and requested that the trial court take no action because it was untimely filed (1 C.R. at 235–237).

On September 18 and September 20, Appellant filed eleven additional exhibits in support of his amended motion (1 C.R. at 238–368).

On September 21, 2020, the trial court held a hearing (5 R.R. at 1). At this hearing, the State brought to the trial court's attention its written objection to Appellant's motion and also objected to the additional exhibits filed on September

18 and September 20 (5 R.R. at 5–7). In spite of these objections, the trial court heard Appellant's motion and ultimately denied it by oral ruling (5 R.R. at 84).

On appeal, the court of appeals decided that the trial court had erred in conducting a hearing on Appellant's amended motion for new trial because he filed his amended motion after a preceding motion had been overruled and the State objected. *Id.* at 422. The court then reviewed Appellant's issues on appeal without reference to the record that was developed at the hearing on his amended motion, and it affirmed the trial court's judgment. *Id.* at 422, 437.

SUMMARY OF THE ARGUMENT

The court's resolution of the State's cross-issue was not inconsistent with this Court's precedent or the precedent of other courts of appeals. The key fact here, which Appellant ignores, is that the State objected to Appellant's untimely amended motion for new trial.

Rule 21.4(b) prohibits the filing of an amended motion for new trial after the trial court has overruled any preceding motion or amended motion for new trial. Case law interpreting this rule is not "outdated" and the rule has always had this clear prohibition. The Texas Supreme Court has construed the civil version in a similar way. This Court has held that the rule permits the State to insist that a trial court only rule on timely filed or timely amended motions for new trial. The State exercised that privilege when it objected to Appellant's amended motion for new trial filed after the trial court had overruled a preceding motion.

Appellant's argument for ignoring rule 21.4(b) is based on distinguishable case law. Moreover, even if the trial court could have rescinded its order overruling Appellant's original motion for new trial to consider Appellant's amended motion, it should have done so in writing, or at least explicitly. Contrary to Appellant's "policy" arguments, judicial efficiency in this case would have been best served by following rule 21.4(b) rather than violating it.

ARGUMENT

The court of appeals correctly concluded that Appellant's amended motion for new trial was not timely because his first motion for new trial had been overruled.

This case is about whether the State can enforce the plain language of rule 21.4(b) of the Texas Rules of Appellate Procedure by objecting to an amended motion for new trial that is filed within thirty days of the imposition of sentence but after a court has already overruled a preceding motion for new trial.

Rule 21.4(b) provides a variable deadline for amending a motion for new trial. That deadline can fall anytime from the filing date of a motion for new trial to thirty days after the imposition of sentence. Tex. R. App. P. 21.4(b). The deadline is sooner than thirty days when a court overrules any preceding motion or amended motion for new trial. *Id.*

Appellant argues that this sooner-than-thirty-day deadline evaporates if the trial court rescinds its order overruling the original motion for new trial, and that the trial court did just that when it conducted a hearing on his amended motion over the State's objection. Appellant assumes that this implicit rescission made his untimely amendment timely, and from there he argues that the trial court could consider the merits of his amended motion over the State's objection. This argument disregards the text of the rule and, if accepted, would thwart the State's ability to enforce it.

A. Rule 21.4(b) means what it says: An amended motion for new trial is untimely if it is filed more than thirty days after the imposition or suspension of sentence in open court or after the trial court has overruled any previously filed motion or amended motion for new trial.

Rule 21.4(b) provides:

> (b) *To Amend*. Within 30 days after the date when the trial court imposes or suspends sentence in open court but before the court overrules any preceding motion for new trial, a defendant may, without leave of court, file one or more amended motions for new trial.

Id. Thus, after a court overrules any preceding motion for new trial, a defendant may not file an amended motion for new trial, even if that amended motion is filed within thirty days after a trial court imposes sentence. *Id.*; *Starks v. State*, 995 S.W.2d 844, 846 (Tex. App.—Amarillo 1999, no pet.) (citing *Ex parte Drewery*, 677 S.W.2d 533, 536 (Tex. Crim. App. 1984)).

In *Starks*, the Amarillo court of appeals said that the language of the rule "is clear" that an amended motion cannot be filed after the court overrules any preceding motion:

> The amendment(s) must be filed within 30 days from imposition of or suspension of sentence in open court, but the time for filing an amended motion may end earlier than the 30-day period if the court overrules a motion or amended motion prior to the lapse of the 30 day period. *The overruling of a preceding motion or amendment terminates the time during which amendments are allowed*.

Id. at 846 (emphasis added). The courts of appeals in Dallas, Corpus Christi, and Houston have agreed. *See, e.g.*, *Earl v. State*, No. 05-99-00237-CR, 2000 WL 566961, at *7 (Tex. App.—Dallas Apr. 28, 2000, pet. ref'd) (not designated for

publication) ("Because appellant's original motion for new trial had been overruled by the time appellant sought leave to file an amended motion, the time for amending the motion had expired *and the trial court had no discretion to grant appellant leave to file an amended motion*.") (emphasis added); *Else v. State*, No. 05-99-00238-CR, 2000 WL 566962, at *7 (Tex. App.—Dallas Apr. 28, 2000, pet. ref'd) (not designated for publication) (same); *Silguero v. State*, No. 13-01-00860-CR, 2005 WL 3214849, at *3 (Tex. App.—Corpus Christi Nov. 30, 2005, pet. ref'd) (mem. op., not designated for publication) (defendant not harmed by trial court's failure to appoint appellate counsel to file a motion for new trial because the trial court overruled a preceding motion, barring any amended motion); *Springstun v. State*, No. 14-98-01455-CR, 2001 WL 491204 (Tex. App.—Houston [14th Dist.] May 10, 2001, no pet.) (not designated for publication) ("Finding *Starks* persuasive, we find that the trial court could not have permitted amendment of appellant's motion for new trial [after] it was overruled.").

1. **The court of appeals did not, as Appellant contends, rely on "outdated" cases because the language of the prior rules and statutes governing amendments to motions for new trial, although reworded, has remained substantively consistent.**

The court of appeals relied on these cases in its opinion below. *Rubio*, 596 S.W.3d at 419–20. Appellant contends that the court relied on an "outdated line of reasoning" employed in *Starks*, *Else*, and *Springstun* and says that those cases applied "an interpretation of an older rule" that preceded rule 21.4 (Appellant's Br.

13, n. 2). Each of these cases relied on this Court's decision in *Drewery*, 677 S.W.2d 533 and its reference to *Hanner v. State*, 572 S.W.2d 702 (Tex. Crim. App. 1978).

The "older rule" that Appellant dismisses is the former article 40.05 of the Code of Criminal Procedure, which was the predecessor statute to rule 21.4. When this Court decided *Hanner* in 1978, article 40.05 required a motion for new trial to be filed "within ten days after conviction," allowed the motion to "be amended by leave of court at any time before it is acted on within twenty days after it is filed," and further provided that "for good cause shown the time for filing or amending may be extended by the court." Code of Criminal Procedure, 59th Leg., R.S., ch. 722, § 1, art. 40.05, 1965 Tex. Gen. Laws 317, 477 (amended 1981, repealed 1986). By the time this Court decided *Drewery* in 1984, the legislature had amended article 40.05 to change the filing and amendment deadlines and the leave-of-court requirement. Act of May 31, 1981, 67th Leg., R.S., ch. 291, § 107, art. 40.05(a), (b), 1981 Tex. Gen. Laws 761, 803–04 (repealed 1986). Under the amended statute, a motion for new trial had to be filed "prior to or within 30 days after the date the sentence is imposed or suspended in open court," but "[o]ne or more amended motions for new trial" could be filed "without leave of court before any preceding motion for new trial filed by the movant is overruled and within 30 days after the date the sentence is imposed or suspended in open court." *Id.*, *see also State v. Moore*, 225 S.W.3d 556, 563 (Tex. Crim. App. 2007) (describing 1981 amendments to article 40.05).

If that language sounds familiar, it should. When this Court was granted rule-making authority in 1985, it enacted rule 31(a)(2), which read:

> (2) *To Amend*. Before a motion or an amended motion for new trial is overruled it may be amended and filed without leave of court within 30 days after [the] date sentence is imposed or suspended in open court.

See id. at 565. In 1997, that rule became rule 21.4(b), which read then exactly as it reads now:

> (2) *To Amend*. Within 30 days after the date when the trial court imposes or suspends sentence in open court but before the court overrules any preceding motion for new trial, a defendant may, without leave of court, file one or more amended motions for new trial.

See id.

Thus, despite Appellant's attempt to impugn *Starks*, *Else*, and *Springstun*, the language of rule 21.4(b) is substantively unchanged from the "older rule" that those cases construed. Whether you call it article 40.05, rule 31(a)(2), or rule 21.4(b), it does the same thing—it allows the filing of amended motions for new trial only before the trial court "acted on" or "overruled" a preceding motion.

2. Considering the civil analogue to rule 21.4(b), the Texas Supreme Court has concluded that once a court overrules a motion for new trial, attempted amendments are untimely.

The Supreme Court of Texas has already considered the timeliness of an amended motion for new trial after a preceding motion has been overruled under a rule very similar to rule 21.4(b). The civil analogue to rule 21.4(b) is rule 329b(b) of the Texas Rules of Civil Procedure. Rule 329b(b) provides:

> (b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

Tex. R. Civ. P. 329b(b).

In *In re Brookshire Grocery Co.*, 51 Tex. Sup. Ct. J. 275, 250 S.W.3d 66 (2008), the Texas Supreme Court considered whether an amended motion for new trial filed after a court overruled a preceding motion was "timely" for the purposes of extending the trial court's plenary power. The Court determined that an amended motion is not timely filed if it is filed after a preceding motion for new trial has already been overruled. *Id.* at 69–70.

Brookshire had argued that an amended motion for new trial could be timely filed after a preceding motion was overruled as long as it is filed with leave of court and within thirty days of judgment. *Id.* at 70. But the Court rejected this argument, commenting that "throughout the history of Rule 329b, timely amended motions for new trial have always been limited to those filed before the trial court overruled a preceding motion, regardless of whether leave of court was required." *Id.* at 71. The Court therefore concluded that "an amended motion for new trial filed after the court has ruled on a prior motion is not 'timely' . . . *even if* leave of court is obtained and it is filed within thirty days of judgment." *Id.* (emphasis in original).

There has been some suggestion that *Brookshire* supports Appellant's position in the sense that a trial court can rescind an order to resurrect and otherwise untimely

amended motion. *See Burt v. State*, 396 S.W.3d 574, 579–80 n. 2 (Tex. Crim. App. 2013) (Keller, P.J., dissenting). In *Brookshire*, the Court stated that its holding "does not preclude a party whose motion for new trial has been overruled from continuing to seek a new trial while the trial court is still empowered to act. . . . thus, the losing party may ask the trial court to reconsider its order denying a new trial—or the court may grant a new trial on its own initiative—so long as the court issues an order granting new trial within its period of plenary power." *Brookshire*, 250 S.W.3d at 72.

But this language does not empower courts to consider the merits of an untimely amended motion filed after it overruled a preceding motion. Instead, it permits the trial court to do two things. First, the court may reconsider the merits of the motion already made. Second, the court may consider whether to grant a new trial *on its own motion* based on the claims in the untimely amended motion. That second option, however, is limited to civil cases. A trial court in a civil case can grant new trials on its own motion. *See* Tex. R. Civ. P. 320. A trial court in a criminal case cannot. *See State v. Aguilera*, 165 S.W.3d 695, 698 n. 9 (Tex. Crim. App. 2005) (". . . a trial court does not have authority to grant a new trial on its own motion; there must be a timely motion for such by the defendant.").

3. The rule permits the State to insist that the trial court rule only upon timely motions for new trial as originally filed or timely amended, but not as untimely amended.

Rule 21.4(b) is not self-enforcing. It does not affect a trial court's jurisdiction or authority over the filing and consideration of amended motions for new trial. *Moore*, 225 S.W.3d at 568. Instead, it permits the State to insist that a trial court only consider timely filed amendments. *Id.* at 570.

An amended motion for new trial can be untimely for two reasons: (1) if it is filed more than thirty days after the trial court imposes or suspends sentence in open court, or (2) if it is filed after the trial court has already overruled any preceding motion for new trial. Tex. R. App. P. 21.4(b); *Starks*, 995 S.W.2d at 846; *White v. State*, Nos. 05-96-01356-CR, 05-96-01357-CR, 05-96-01358-CR, 1998 WL 293721 (Tex. App.—Dallas June 8, 1998, no pet.) (not designated for publication) (amended motion filed within thirty days of imposition of sentence untimely because it was filed after the trial court already overruled a previously filed motion).

Thus, the State may insist that a trial court not hear an amended motion filed after the denial of a previously filed motion, even if that amended motion is filed within thirty days of imposition of sentence. *See Moore*, 225 S.W.3d at 570 ("Rule 21.4(b) *does* permit the State to insist . . . that the trial court rule only upon the timely motion for new trial as originally filed or timely amended, but not as untimely amended.") (emphasis in original); *Easter v. State*, No. 01-14-00450-CR, 2016 WL

6648812 (Tex. App.—Houston [1st Dist.] Nov. 10, 2016, no pet.) (mem. op. on reh'g, not designated for publication) (following *Moore* regarding amendment filed 36 days after trial court sentenced defendant).

4. The phrase "without leave of court" does not give a trial court license to permit untimely amended motions.

The rule allows a defendant to file timely amended motions for new trial "without leave of court." This does not mean that the defendant can file untimely amended motions "with leave of court." *Moore*, 225 S.W.3d at 566.

In *Moore*, the appellee argued that this Court should construe the "without leave of court" language in rule 21.4(b) to "implicitly authorize the trial court to entertain an amendment filed *after* the thirty days so long as the defendant first seeks and obtains leave of court to do so." *Id.* at 558. In other words, Moore argued that the inclusion of the phrase "without leave of court" in the rule implicitly meant that a defendant could, *with* leave of court, do everything that the rule otherwise prohibited. This Court rejected that argument and held that rule 21.4(b) prohibits a defendant from filing an amended motion for new trial after thirty days "even *with* leave of court." *Id.* (emphasis in original).

Thus, a court cannot grant leave to file an untimely amended motion for new trial. An amended motion that is filed after the trial court overrules a preceding motion is just as untimely as one that is filed after thirty days. There is no reason

why this Court's holding in *Moore* should not apply to all untimely amended motions for new trial.

B. Appellant has given this Court no good reason to ignore the clear meaning of rule 21.4(b).

Under the plain language of rule 21.4(b), the trial court cannot consider an amended motion for new trial after it has overruled any preceding motion and the State objects. Appellant simply argues that this Court should ignore this clear rule, and he offers the Court four reasons for doing so: (1) *Awadelkariem* and *Kirk* allow what the rule prohibits; (2) other lower-court opinions allow the trial court to ignore rule 21.4(b); (3) the court here implicitly rescinded its ruling, which made the amended motion timely; and (4) "policy justifications . . . should compel" disregarding the rule. None of these arguments withstand scrutiny.

1. *Awadelkariem* and *Kirk*, which govern a trial court's power to reconsider motions and claims already made, do not affect rule 21.4(b), which governs amendments and new claims.

Appellant relies heavily upon this Court's opinions in *Awadelkariem v. State*, 974 S.W.2d 721 (Tex. Crim. App. 1998), and *Kirk v. State*, 454 S.W.3d 511 (Tex. Crim. App. 2015), that a trial court may freely rescind an order granting or denying a motion for new trial during its plenary power (Appellant's Br. 11–12).

The State does not quarrel with that basic principle: *Awadelkariem* and *Kirk* held that a trial court may reconsider orders granting or denying motions for new trial and may even rescind those orders if necessary. But those cases do not give trial

courts that have overruled a motion for new trial the ability to violate rule 21.4(b) by rescinding the order and allowing an amended motion for new trial over the State's objection. *See Starks*, 995 S.W.2d at 846 ("*Awadelkariem* did not, however, address the provisions of Rule 21.4 which deal with the time to file and amend a motion for new trial, nor with the power of a trial court to grant either a motion to amend or a motion for leave to amend which was filed after the preceding motion for new trial was overruled.").

In *Awadelkariem*, the trial court granted the defendant's motion for new trial because of an understanding that he would change his plea to guilty and later receive deferred adjudication. *Awadelkariem*, 972 S.W.2d at 722. When the defendant failed to follow through on that agreement, the trial court rescinded its order granting his new trial. *Id.* at 722–23. Thus, the issue was, as this Court put it, "whether a trial court has the power to rescind an order granting a new trial." *Id.* at 722. This Court said that it did. *Id.* at 727.

In *Kirk*, the trial court granted the defendant's "motion for commutation of sentence," providing the defendant with a new trial on punishment. *Kirk*, 454 S.W.3d at 512. The trial court then granted the State's motion to rescind. *Id.* Thus, the issue was whether "there was a time limit on the trial court's power to rescind the granting of a new trial." *Id.* at 511. This Court concluded that there is not. *Id.* at 511, 514–15.

Nowhere in these opinions did this Court purport to address amendments, the rules of appellate procedure governing amendments, or the effect a trial court's decision to rescind an order overruling a motion for new trial might have when considered in the context of the rules governing amendments.

The court below recognized this when it considered Appellant's implied-rescission argument that was based on *Awadelkariem* and *Kirk*. *Rubio*, 596 S.W.3d at 420–22. The court pointed out that the facts here are different from the facts in those cases. Both involved orders granting a motion for new trial and written orders rescinding those orders. There was nothing "implied" about it. Distinguishing those cases from this case, the court noted that Appellant "cites no authority supporting his claim that under these circumstances, the trial court 'impliedly' rescinded its order denying his timely motion for new trial." *Id.* at 421–22. The court also said that this case involved the denial of a motion for new trial, which is a situation that is "expressly contemplated and addressed by rule of appellate procedure 21.4(b)." *Id*. at 420.

Rule 21.4(b) can reasonably be read in harmony with *Awadelkariem*. The rule ends a *defendant's* ability to file an amended motion for new trial after a "court overrules *any* preceding motion for new trial." Tex. R. App. P. 21.4(b) (emphasis added). The question under the text of the rule is whether the trial court has ever overruled any preceding motion. If it has, a defendant may not file an amended

motion. This does not prevent a trial court, under *Awadelkariem*, from reconsidering its previous orders and, if it finds those orders are in error, rescinding and replacing them. Moreover, a trial court can reconsider its own rulings *before* taking any action to rescind them. But permitting a trial court to rescind an order, in order to allow a defendant to circumvent the prohibitions of a court rule, nullifies the rule.

At one time, trial courts could extend the time allowed to file amended motions for new trial. *See Pena v. State*, 767 S.W.2d 206, 207 (Tex. App.—Corpus Christi 1989, no pet.). It makes little sense to read the current rule 21.4(b) to mean that a trial court is prohibited from granting leave to amend over the State's objection—unless it really wants to. Under that reading, the court merely needs to engage in the legal fiction of rescinding its previous denial. But that carries no legal significance; it just permits the defendant to bypass rule 21.4(b) altogether.

2. Lower-court opinions do not permit the court to ignore rule 21.4(b), either.

Appellant also argues that the opinion below conflicts with other lower-court opinions that have disregarded the clear meaning of rule 21.4(b) in two ways (Appellant's Br. 13–18).

First, Appellant points out that some Texas courts, including the court below, have stated or implied in dicta that a trial court can rescind a previous order and then consider an amendment filed within the thirty-day window for an original or amended motion for new trial (Appellant's Br. 14–15). *See Castillo-Diaz v. State*,

No. 05-17-00644-CR, 2018 WL 5291979, at *3 (Tex. App.—Dallas Oct. 25, 2018, no pet.) (mem. op., not designated for publication) ("Because the trial court never granted the motions to rescind its previous order denying appellant's motions for new trial, the trial court had no reason to consider the amended motions for new trial."); *Baxley v. State*, No. 05-96-00684-CR, 2000 WL 781428 (Tex. App.—Dallas June 20, 2000, no. pet.) (op. on reh'g, not designated for publication) ("Because the trial court could rescind its original order, it could properly consider appellant's 'first amended' motion for new trial."); *Campbell v. State*, No. 04-03-00295-CR, 2004 WL 839634, at *2 n. 2 (Tex. App.—San Antonio Apr. 21, 2004, no pet.) (mem. op., not designated for publication) ("Because the court could . . . rescind its order denying Campbell's original motion for new trial, it could properly consider Campbell's 'first amended motion for new trial or, in the alternative, second motion for new trial.'"); *State v. Barron*, No. 08-12-00245-CR, 2014 WL 505497, at *2 (Tex. App.—El Paso Feb. 7, 2014, pet. ref'd) (not designated for publication) ("Once the trial court has overruled a timely-filed motion for new trial, the defendant may not file another motion for new trial during the thirty-day primary period established by Tex. R. App. 21.4 without leave of court.").

But Appellant is incorrect when he suggests that these cases allow the trial court to make an end run around rule 21.4(b) by rescinding a previous order overruling a timely motion for new trial (Appellant's Br. 14). On the contrary, the

trial court's power turns on whether the State objects to an untimely amendment. *Barron* makes this clear. In *Barron*, the court of appeals vacated the trial court's order granting a motion for new trial because the defendant attempted his amendment more than thirty days after the trial court sentenced the defendant, and the State objected. *Id.* at *3.

The other three cases, *Castillo-Diaz*, *Baxley*, and *Campbell*, simply don't address this situation. None of those opinions reflect that the State ever objected to the attempted amendments of the defendants' amended motions for new trial. The courts therefore did not address whether the State could enforce the amendment-limiting provision of rule 21.4(b) by objecting. And absent any objection from the State, a trial court has virtually unfettered ability to consider any untimely motion or amendment, whether it is untimely by being filed over thirty days from the imposition of sentence, or after a preceding motion has been overruled. *See Moore*, 225 S.W.3d at 568. But the State objected in this case.

As more support for his position, Appellant quotes *Porter v. State*, No. 01-17-00534-CR, 2018 WL 3581082, at *9 (Tex. App.—Houston [1st Dist.] July 26, 2018) (mem. op., not designated for publication), *opinion withdrawn and superseded on denial of reh'g*, No. 01-17-00534-CR, 2018 WL 4169482 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. ref'd) (mem. op., not designated for publication) (Appellant's Br. 17–18). But as the citation makes clear, that opinion was withdrawn

and superseded. The paragraph that Appellant quotes is not in the superseding opinion. *See Porter v. State,* No. 01-17-00534-CR, 2018 WL 4169482, at *9 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. ref'd) (mem. op., not designated for publication).

Second, Appellant argues that lower courts have made inconsistent holdings "concerning the trial court's freedom to change its ruling on a motion for new trial during its plenary jurisdiction" (Appellant's Br. 15–16). Appellant is incorrect. All the cases cited by Appellant state that a trial court can rescind its orders on motions for new trial only during its plenary jurisdiction. *See Stepan v. State*, 244 S.W.3d 642, 644–46 (Tex. App.—Austin, 2008, no pet.); *Meineke v. State*, 171 S.W.3d 551, 555–56, 558 (Tex. App.—Houston [14th Dist.] 2005, pet ref'd); *Townley v. State*, No. 02-17-00046-CR, 2018 WL 4924943, at *1–4 (Tex. App.—Fort Worth Oct. 11, 2018, pet. ref'd) (not designated for publication); *Bindock v. State,* No. 04-17-00643-CR, 2018 WL 3039918, at *1–2 (Tex. App.—San Antonio June 20, 2018, pet. ref'd) (not designated for publication); *Barron*, 2014 WL 505497, at *2; *Motley v. State*, No. 01-07-00517-CR, 2008 WL 5102340, at *5 (Tex. App.—Houston [1st Dist.] Dec. 4, 2008, pet. ref'd) (not designated for publication); *Campbell*, 2004 WL 839634, at *2 n. 2.

Nothing in the opinion below conflicts with these cases. To the contrary, the court below observed that "a trial court may rescind an order granting or denying a

motion for new trial after the thirty-day deadline imposed by rule of appellate procedure 21.4(b).” *Rubio*, 596 S.W.3d at 419.

3. If a trial court can circumvent rule 21.4(b) by rescinding an order overruling a previously filed motion for new trial, that rescission should be in writing or at least be explicit.

Appellant next argues that the trial court—having the authority to rescind its order overruling the motion for new trial—did so in this case, which made the amended motion timely (Appellant’s Br. 18–19).

A trial court may rescind an order granting or denying a motion for new trial. *Awadelkariem*, 974 S.W.2d at 728. But it should do so in writing. Appellant asserts that the rules of appellate procedure impose only one writing requirement: “that a trial court rule on a motion for new trial in writing to orders granting motions for new trial. See Tex. R. App. R. 21.8(b) [sic]” (Appellant’s Br. 19, n. 3). But this is not correct.

The only way a trial court can rule on a motion for new trial is by written order. Tex. R. App. P. 21.8(c). If the trial court does not rule on the motion by written order within seventy-five days, then the motion is overruled by operation of law. *Id*. That’s why the rule requires that an order granting a motion for new trial must be in writing. *Id.* 21.8(b). If it isn’t in writing, then the motion is deemed denied after seventy-five days. *Id.* 21.8(c). That automatic denial terminates the trial court’s plenary power to do *anything*.

In light of that, the primary reason for requiring rescissions of written orders to be in writing is consistency. An order granting a new trial, which transforms a convicted individual into one that is presumptively innocent, must be in writing. *Id.* 21.8(b). Rescission of such an order transforms the now presumptively innocent individual back into a convict, so it should also be in writing. Similarly, a written order denying a motion for new trial terminates the time period for filing amended motions. *Id.* 21.4(b). Rescission of such an order, which would reopen that time period, should also be in writing so that both sides know when the clock has begun to run. An *un*written order, on the other hand, does not do anything until after seventy-five days, when the law deems the motion denied as a matter of law. But at that point, the court does not have plenary power to rescind it at all.

In fact, this Court's decision in *Kirk* appears to require that at least some rescission orders be in writing—specifically, those issued more than seventy-five days after the imposition of sentence. In *Kirk*, this Court stated that in such a scenario, "the rescinding order shall be treated as an 'appealable order' under Texas Rule of Appellate Procedure 26.2, and appellate timetables will be calculated from the date of that order." *Kirk*, 454 S.W.3d at 515. This Court has generally frowned upon the argument that oral rulings are sufficient to constitute appealable orders. *See State v. Sanavongxay*, 407 S.W.3d 252, 258 (Tex. Crim. App. 2012) ("An oral ruling

is not 'an order' for the purposes of establishing the decision of the trial court . . . .").

There is another reason to require that rescission orders be in writing, or at least explicit. When a trial court has overruled a motion for new trial, no statute or rule requires the court to rescind its order before reconsidering the merits of the original motion. An "implied rescission" is therefore ambiguous. No one can tell whether the trial court is rescinding its denial order, which might reopen the time for amendments, or simply reconsidering the original motion, which would preclude the defendant from filing any amendments. This effect exposes what rescission of a denial order actually does: it circumvents rule 21.4(b), even when the State objects. If the court is going to circumvent the rule, it should do so explicitly, preferably in writing.

The trial court was not even explicit here. The court told Appellant's counsel: "Well, I'm going to let you present your motion because you have done all this work" (5 R.R. at 6). But Appellant's motion was a "Motion for Leave to File Amended Motion for New Trial" *and* "Amended Motion for New Trial" (1 C.R. at 140). In the motion, Appellant did not mention rule 21.4(b) or *Awadelkariem*, but rather conveyed an impression that the trial court had authority to grant leave to amend and that Appellant was seeking that leave. At the hearing, when Appellant did bring up *Awadelkariem*, his counsel told the court, "you are allowed to *change*

your order as long [as] we remain within the 75-day period following judgment" (5 R.R. at 5) (emphasis added). It is possible that the trial court thought it could entertain amended motions within thirty days of the imposition of sentence without regard to its prior actions. After all, Appellant did not ask the trial court to rescind its order so it could consider new claims, he asked the trial court to consider new claims so that it could *change* its order (5 R.R. at 5). Thus, there is no indication that the court even intended to rescind its prior order, much less that it actually did so.

Because the trial court did not enter a written order—and did not even make an explicit ruling—rescinding its order that overruled Appellant's preceding motion for new trial, that order stood, and Appellant's amended motion was untimely.

Appellant argues that in *Motley v. State*, No. 01-07-00517-CR, 2008 WL 5102340, at *5 (Tex. App.—Houston [1st Dist.] Dec. 4, 2008, pet. ref'd) (not designated for publication), the court of appeals in that case "upheld the trial court's constructive rescission when, on the 75th day after imposing sentence, the trial court granted defendant's motion for new trial, immediately thereafter granted the State's motion to reconsider, and then changed its order" (Appellant's Br. 18). It is not entirely clear from the opinion in *Motley how* the trial court rescinded its order. The opinion only states that the trial court "reversed its ruling to grant appellant's motion for new trial" and that the court "granted the State's motion to reconsider." *Id.* What is clear is that the court *changed* its order. If a trial court changes its order from one

granting a motion for new trial to one denying a motion for new trial, this is not a "constructive rescission"—it is an explicit change.

4. Appellant's policy arguments cannot justify disregarding rule 21.4(b) or the State's ability to enforce it.

Appellant makes two policy arguments for why the court of appeals should determine his claims on the current record: judicial efficiency and availability of counsel (Appellant's Br. 20–24). He makes both arguments for the first time in this Court. Neither justifies disregarding rule 21.4(b) or the State's ability to enforce it.

Judicial efficiency would have been better served had the trial court followed rule 21.4(b) and not held a hearing on the amended motion. Appellant argues that "it would be a waste of judicial taxpayer resources to impose Rule 21.4" on Appellant and require him to "re-litigate all of his claims in a habeas proceeding." (Appellant's Br. 20). But that is what habeas proceedings are for. The waste of taxpayer and judicial resources happened when the trial court held a hearing over the State's objection in violation of rule 21.4(b).

The kind of judicial efficiency argument that Appellant makes here would apply to any case in which a trial court considers an untimely amendment over an objection from the State. Using "judicial efficiency" to excuse enforcement of rule 21.4(b) when the State objects would prevent the State from enforcing the rule against any untimely amendment, whether based on the overruling of a preceding

motion or the lapse of thirty days. That would directly contradict this Court's holding in *Moore*.

As part of his judicial efficiency argument, Appellant suggests that this court suspend the operation of rule 21.4 by exercise of its authority under rule 2 (Appellant's Br. 20). Appellant did not ask the court of appeals to consider such an action, and he should not be permitted to complain that it did not do so for the first time in this Court.

Finally, Appellant complains that he "may not again have counsel to pursue his claims in a habeas proceeding." While it is true that an indigent defendant has no right to counsel in a post-conviction habeas proceeding, the possibility that he "may not" have counsel is no reason to disregard rule 21.4. The trial court can appoint counsel for Appellant, and it must do so if it concludes that the interests of justice require representation. Tex. Code Crim. Proc. Ann. art. 1.051(d)(3).

The law sets out two clear ways for Appellant to pursue his claims: file a timely amended motion for new trial, or litigate them in a habeas proceeding. Appellant failed to do the first; he is perfectly capable of doing the second. There is no reason to create a third way—especially one that violates the plain language of rule 21.4(b).

C. Conclusion

Rule 21.4(b) imposes clear deadlines for filing amendments to motions for new trial, and this Court has clearly stated that the State may enforce those deadlines by objection. The State did so—both in writing and in open court. This Court should not adopt a construction of this rule that dismantles its text and impairs the State's ability to enforce it. The court of appeals correctly sustained the State's cross-issue and its judgment should be affirmed.

PRAYER

The State prays this Court affirm the judgment of the court of appeals.

Respectfully submitted,

JOHN CREUZOT
Criminal District Attorney
Dallas County, Texas

/s/ Jessie R. Allen
JESSIE R. ALLEN
Assistant District Attorney
Lead Counsel
Bar No. 24040412
133 N. Riverfront Blvd., LB-19
Dallas, Texas 75207
jessie.allen@dallascounty.org
(214) 653-3600
(214) 653-3643 fax

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Name	BarNumber	Email	TimestampSubmitted	Status
Christina Thompson Dean	24004948	christi_dean@hotmail.com	9/16/2020 11:26:47 PM	SENT
Christi Dean		ctdean@dallascounty.org	9/16/2020 11:26:47 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule	24031632	information@spa.texas.gov	9/16/2020 11:26:47 PM	SENT